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208242

June 30, 2003

VIA HAND DELIVERY

Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings

JUN 30 2003

Part of
Public Record



RE: **STB Finance Docket 34192 - Hi-Tech Trans, LLC - - Petition for Declaratory Order - - Hudson County, New Jersey.**

Dear Secretary Williams:

We are Special Counsel for the New Jersey Department of Environmental Protection ("NJDEP") in the above referenced proceeding and I have been served with a letter dated June 26, 2003 from James A. Fletcher (the "Fletcher Letter"), counsel for Hi Tech Trans, LLC ("Hi Tech"). In this letter, Hi Tech purports to "advise the Board of extra-legal developments" which have taken place since the filing of its June 17, 2003 petitions. In view of the assertions contained in the Fletcher Letter, which NJDEP believes to be both inaccurate and misleading, NJDEP feels constrained to reply.

NJDEP does intend to reply to the merits of Hi Tech's pleadings in accordance with the procedures set forth in the Board's rules. While Hi Tech again claims that it is seeking emergency relief from the Board, it does not explain why it did not request NJDEP, counsel for the other parties or the Board to shorten the time frames for responses. It is disingenuous for Hi Tech to imply that there is something inappropriate with responding in accordance with the established procedures in 49 C.F.R. § 1104, when it never sought to have those deadlines shortened. Moreover, Hi Tech originally

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filed a petition for clarification on June 6, 2003. Had it not withdrawn that pleading on June 17 and filed new papers at that time, NJDEP's position would have already been filed with the Board. Thus, Hi Tech once again should look to its own decisions and strategies before suggesting that any party -- other than Hi Tech -- is guilty of delay.

Hi Tech notes correctly that it was served with an Administrative Order issued by NJDEP on May 28, 2003, which directed it to cease and desist operations violating state environmental statutes effective June 17, 2003. Precisely why this should engender sympathy from the Board is not made clear. Nonetheless, even though that order provided that Hi Tech was entitled to request a hearing, Hi Tech waited until June 18 to request a hearing and seek a stay of the effectiveness of that decision. Hi Tech initially sought instead to enjoin the enforcement of the Administrative Order by filing a Complaint against NJDEP in the U.S. District Court for the District of New Jersey, which has now, on two occasions, denied relief to petitioner. And, as Mr. Fletcher's letter points out, Hi Tech has also appealed those decisions to the United States Court of Appeals for the Third Circuit, which has also ruled against Hi Tech twice. Consequently, it is Hi Tech that has sought to delay the resolution of whether it has been or is acting in violation of provisions of the New Jersey Solid Waste Management Act, N.J.S.A. 13:1 E-1 *et seq.* and the Solid Waste Utility Control Act, N.J.S.A. 48:13 A-1 *et seq.* and the regulations promulgated thereunder.

Indeed, Judge Hochberg of the U.S. District Court, who denied both of Hi Tech's requests to enjoin the NJDEP administrative proceedings, specifically noted that, notwithstanding Hi Tech's often repeated claims of emergencies, any difficulties it is sustaining as a result of NJDEP's issuance of the Administrative Order are its own fault. In Judge Hochberg's words:

[T]he emergency is of Hi Tech's own making, in that its dispute with the state authorities has been simmering for over a year, during which time Hi Tech sought a formal opinion from the STB on certain issues and sought no reconsideration nor any judicial relief when the STB opined adversely to Hi Tech on November 19, 2002, as to one related issue and declined to reach the issue presented here.

Hi Tech Trans, LLC et al. v. Bradley M. Campbell, Commissioner of the State of New Jersey, Department of Environmental Protection et al., Civil Number 03-2751 (Decision dated June 20, 2003) at 4, n.5. (For the Board's convenience, we have attached a copy of this Decision to this letter.)

Finally, as to the so-called merits of the Fletcher Letter, even if they were somehow relevant to the issues before the Board (which is not the case), the allegations are incorrect and misleading. Obviously, NJDEP *has* begun "formal enforcement action against Hi Tech" and did so by initiating the Administrative Order proceeding. Unless stayed, Hi Tech will be required to abide by the decisions of that Order and, in any



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event, should have desisted from further violations effective June 17, 2003. In addition, and again while not relevant to the matters involved here, NJDEP denies that it has subpoenaed any records of Hi Tech's customers or even having an unmarked car "with an orange mars light on top". Nor has it sent representatives out to inform Hi Tech's customers not to continue doing business with Hi Tech. On the other hand, NJDEP's position that Hi Tech is in violation of the laws set forth in the Administrative Order is both appropriate and well known. That those customers may now be concerned about their own liability should hardly come as a surprise.

In accordance with the Board's rules, we have enclosed an original and ten copies of this letter. We have also enclosed one additional copy and request that it be date-stamped and returned to us so that our records may properly reflect the filing.

If you have any questions concerning this, please do not hesitate to contact me.

Very truly yours,

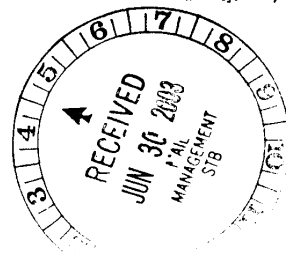
Edward D. Greenberg /ldt

Edward D. Greenberg

cc: James A. Fletcher, Esq. (via Facsimile)
Thomas J. Litwiler, Esq. (via Facsimile)
Benjamin Clarke, Esq. (via Facsimile)
James H. Martin, Deputy Attorney General (via Facsimile)
All parties of record (via U.S. Mail)



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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC, and DAVID STOLLER,

Plaintiffs,

v.

BRADLEY M. CAMPBELL, COMMISSIONER
OF THE STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, and WOLF SKACEL,
DIRECTOR OF WASTE COMPLIANCE AND
ENFORCEMENT AND RELEASE PREVENTION,
STATE OF NEW JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendants.

Civil No. 03-2751 (FSH)
Hon. Faith S. Hochberg, U.S.D.J.

ORDER

Date: June 20, 2003

HOCHBERG, District Judge:

This matter having come before the Court on short notice upon Plaintiffs', Hi Tech Trans LLC and David Stoller ("Hi Tech" or "Plaintiffs"), renewed request for an Order to Show Cause with Temporary Restraints seeking, inter alia, to enjoin the administrative enforcement proceeding of the New Jersey Department of Environmental Protection ("DEP"), which issued an Order May 27, 2003 declaring Hi Tech to be "an illegal solid waste facility" and ordering that it cease and desist its illegal operations;

and the Court noting that Plaintiffs have filed an Amended Complaint for declaratory judgment¹ naming two new Defendants;²

¹ Hi Tech's Amended Complaint seeks a declaratory judgment that an administrative agency with jurisdiction over interstate rail transportation ("the Surface Transportation Board" or

and the Court having immediately granted a hearing on short notice in the matter;
 and the Court having considered all of the submissions of the parties;
 and the Court having had oral argument on the matter on June 11, 2003;
 and for good cause having been shown;
 and the Court finding that the doctrine of Ex parte Young permits Plaintiffs' Amended Complaint to proceed against these new Defendants in their official capacities because Plaintiffs allege an ongoing violation of federal law and seeks only prospective relief;³

and the Court further declining to enjoin the enforcement of New Jersey's state environmental laws and regulations and abstaining from entertaining the instant action due to considerations of federalism and comity⁴ based upon its determination that both

"STB") has exclusive jurisdiction over Hi Tech, notwithstanding that Hi Tech is neither a rail carrier nor a subsidiary of a rail carrier but rather is a licensee of CP Railway which has not appeared in the action. Hi Tech seeks a declaratory judgment that Hi Tech is exempt from New Jersey DEP's permitting and licensing regulations, as well as a declaratory judgment that the state environmental protection agency cannot enforce "any [of its own regulations] against Plaintiffs unless that action has been authorized by the Surface Transportation Board." Amended Complaint, p. 11.

² Plaintiffs have amended its Complaint to name Bradley A. Campbell, the Commissioner of the State of New Jersey Department of Environmental Protection, and Wolf Skacel, Director of Waste Compliance and Enforcement and Release Prevention, State of New Jersey Department of Environmental Protection.

³ In Ex parte Young, the United States Supreme Court held that the Eleventh Amendment does not bar a suit for prospective injunctive relief when a litigant alleges a state officer violated federal law. Ex parte Young, 209 U.S. 123 (1908); see also Verizon Maryland Inc., v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002) (in determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a federal court need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective).

⁴ In Younger v. Harris, 401 U.S. 37, 41 (1971), the United States Supreme Court articulated some of the principles and policies that underlie the "notion of 'comity'" that exists

Younger⁵ and Burford⁶ abstention doctrines should be applied in the instant case;⁷

between our national and state governments. This

notion of "comity" . . . is [] a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44-45.

⁵ Younger v. Harris, 401 U.S. 37, 41 (1971). In Middlesex County Ethics Committee v. Garden State Bar Ass'n, the Supreme Court set forth a three-step test a court should utilize when determining whether abstention under Younger is appropriate: (1) there must be an ongoing state proceeding that is judicial in nature; (2) the state proceeding must implicate important state interests; and (3) the state proceeding affords an adequate opportunity to raise federal claims. 457 U.S. 423, 432 (1982).

Applying these factors to the instant case, this Court finds that abstention is warranted on Younger grounds because: (1) there is a state administrative proceeding currently pending which is judicial in nature, see Ohio Civil Right Comm'n v. Dayton Christian Schools, 477 U.S. 619 (1986); (2) New Jersey has a highly significant state interest in the regulation of its solid waste facilities, see N.J.S.A. 13:1E-2(a); and (3) the DEP and the appellate courts of New Jersey provide an adequate opportunity for Hi Tech to raise all of its federal claims.

⁶ In Burford v. Sun Oil Co., 319 U.S. 315 (1943), the United States Supreme Court recognized that federal abstention is appropriate to defer to comprehensive state administrative procedures. The Supreme Court has provided a clear definition of the Burford doctrine:

Where timely and adequate state court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance

transcends the result in the case at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 361 (1989).

With respect to the first prong above, New Jersey's environmental regulations are clearly comprehensive and serve to ameliorate the important policy problems of public health, welfare and safety relating to the storage and disposition of solid waste. In addition, the importance of the issues at stake in the DEP action with Hi Tech transcend the results in that case. Plainly stated, if solid waste facilities can immunize themselves from state environmental licensing regulations through the opportunism of locating themselves near a railroad and using rail transportation, the comprehensive regulatory scheme established to protect the environment and public health and safety may well be seriously eroded. Moreover, this Court's intervention into the State's comprehensive regulatory scheme of solid waste facilities would undermine state efforts to adopt a coherent and complete policy with respect to an area of such grave public concern.

In addressing the second prong of this test, three issues must be addressed: (1) whether the particular regulatory scheme involves a matter of substantial public concern; (2) whether it is "the sort of complex, technical regulatory scheme to which the Burford abstention doctrine usually is applied"; and (3) whether review of a party's claims would interfere with the state's efforts to establish and maintain a coherent regulatory policy. Chiropractic America v. Lavecchia, 180 F.3d 99, 104 (3d Cir. 1999). There can be no doubt that a state endeavoring to minimize the risks of environmental pollution is a matter of grave public concern. Indeed, the Legislature found in formulating the Solid Waste Management Act that "solid waste is a matter of grave concern, which is thoroughly affected with the public interest." N.J.S.A. 13:1E-2; see also N.J.S.A. 48:13A-2 (finding disposal of solid waste a matter of grave concern, which is also thoroughly affected by the public interest). In response to such findings, the DEP and New Jersey State Legislature have developed a complex technical regulatory scheme, the kind to which Burford abstention is usually applied. This Court also finds that its intervention into an administrative enforcement proceeding of New Jersey's comprehensive environmental regulation scheme would seriously undermine New Jersey efforts to establish and maintain a coherent and uniform regulatory policy. Timely and adequate state court review of state administrative action is available in the Superior Court of New Jersey. Hi Tech can seek emergent relief through the state's administrative and judicial forums because all administrative action is subject to careful review in the state courts, which can rule upon issues of both state and federal law. Although Hi Tech is now seeking relief on short notice, it can also do so in the state courts. Moreover, the emergency is of Hi Tech's own making, in that its dispute with the state authorities has been simmering for over a year, during which time Hi Tech sought a formal opinion from the STB on certain issues and sought no reconsideration nor any judicial relief when the STB opined adversely to Hi Tech on November 19, 2002 as to one related issue and declined to reach the issue presented here.

and the Court further exercising its discretion not to entertain a suit that seeks solely a declaratory judgment;⁸

⁷ Plaintiffs argue that this Court should not abstain because Hi Tech is seeking a declaratory judgment that federal law preempts the New Jersey Department of Environmental Protection's Order dated May 27, 2003. Plaintiffs rely on Ford v. Insurance Commissioner of the Commonwealth of Pa., 874 F.2d 926 (3d Cir. 1989), among other cases, for this proposition. In Ford, the United States Court of Appeals for the Third Circuit, stated:

[i]n this case, as in Kentucky West [Va. Gas Co. v. Pa. Public Utility Comm'n., 791 F.2d 1111 (3d Cir. 1986)], we note that there is no absolute rule in prohibiting the application of Younger abstention doctrine whenever the Supremacy Clause is invoked. See Kentucky West, 791 F.2d at 1117 ("[i]t would . . . be an overstatement to suggest that Younger abstention is never appropriate when the question presented is one of preemption.") The presence of a claim of preemption in such cases, however, requires review of the state interest to be served by abstention, in tandem with the federal interest that is asserted to have usurped the state law,

Id. at 934. While in Ford, the Third Circuit found that no beneficial purpose would be served by the district court's abstention, the analysis in this case reaches a different result. While the federal interest in regulating interstate railroads is indeed strong, the federal interest in this case is vitiated at least in part by the unprecedented claim of Hi Tech to be treated as a "railroad," when it is in fact a solid waste transfer station operating pursuant to a license from a railroad. Despite ample opportunity to acquire rail carrier status, it has failed to do so. Indeed, on July 3, 2000, Hi Tech filed a Notice of Exemption in accordance with 49 C.F.R. § 1150.32 in an attempt to "commence common carrier rail service" over 641 miles of Canadian Pacific rail track. See Hi Tech Trans. LLC - Operation Exemption - Over Lines Owned By Canadian Pacific Railway and Connecting Carriers, Finance Docket No. 33901. Hi Tech withdrew its Notice of Exemption on July 17, 2000, and has never obtained status as a rail carrier.

◦ Balancing this rather attenuated federal interest against the interests of the State of New Jersey, there is a well-recognized compelling state interest in the DEP's enforcement of its own environmental laws especially as to the uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades. Upon balancing the state and federal interests in this case, this Court reaches a different conclusion than that reached in Ford. Accordingly, this Court will abstain from entertaining Plaintiffs' Amended Complaint and will exercise its discretion not to grant the declaratory relief sought by Hi Tech.

⁸ 28 U.S.C. § 2201; State Auto Ins. Companies v. Summy, 234 F.3d 131 (3d Cir. 2000) (finding that district court should have declined to exercise its discretion to entertain declaratory judgment action in light of pending state case involving same issues).


IT IS on this 20th day of June 2003,

ORDERED that Plaintiffs' Amended Complaint is **DISMISSED**; and it is further

ORDERED that Plaintiffs' Motion for a Preliminary Injunction is accordingly **DENIED**;⁹

and it is further

ORDERED that this case is **CLOSED**.


HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE

⁹ The Court need not address the parties' arguments for and against injunctive relief on the merits because it has decided to abstain from entertaining this action.